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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1970**

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**No. 84**

**UNITED STATES, APPELLANT**

**v.**

**MILAN VUITCH**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA**

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**BRIEF FOR THE UNITED STATES**

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## **OPINION BELOW**

The memorandum opinion of the United States District Court for the District of Columbia (App. 5-10) is reported at 305 F. Supp. 1032.

## **JURISDICTION**

On November 10, 1969, the District Court entered orders (App. 11-12) granting appellee's pre-trial motion to dismiss the indictments against him, on the ground that a portion of the statute upon which the indictments were founded (22 D.C. Code 201) was unconstitutionally vague. Notices of appeal were filed in the district court on December 10, 1969 (App. 13<sup>1</sup>).

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<sup>1</sup>Only one of the two notices of appeal is included in the Appendix.

On April 27, 1970, this Court issued an order (App. 14) postponing consideration of the question of jurisdiction in this case to the hearing on the merits. On June 29, 1970, the Court issued a further order requesting the parties to brief and argue specified questions (incorporated in questions 1 and 2 below) concerning the jurisdictional issue.

#### **QUESTIONS PRESENTED**

1. Whether this Court has jurisdiction under the Criminal Appeals Act, 18 U.S.C. 3731, to entertain a direct appeal from a decision of the United States District Court for the District of Columbia dismissing an indictment on the ground of the invalidity of the statute on which the indictment is founded, where the statute, although an act of Congress, applies only in the District of Columbia.

2. Whether the district court's decision in this case could have been appealed to the Court of Appeals for the District of Columbia Circuit pursuant to 23 D.C. Code 105 and, if so, whether this Court should, as a matter of sound judicial administration, abstain from accepting jurisdiction pursuant to 18 U.S.C. 3731 because the case involves the validity of a statute the application of which is confined to the District of Columbia?

3. Whether the phrase "necessary for the preservation of the mother's life or health" contained in the District of Columbia abortion statute is unconstitutionally vague on its face.

#### **STATUTES INVOLVED**

18 U.S.C. 3731 provides in pertinent part:

An appeal may be taken by and on behalf of

the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

\* \* \* \* \*

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

\* \* \* \* \*

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

The Act of March 3, 1901, c. 854, 31 Stat. 1189, 1341, Section 935 (23 D.C. Code 105(a) (Supp. III, 1970)) provides:

In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of

exceptions: *Provided*, That if on such appeal it shall be found that there was error in the rulings of the court during a trial, a verdict in favor of the defendant shall not be set aside.

The Act of March 3, 1901, c. 854, 31 Stat. 1189, 1322, Section 809, as amended by Act of June 29, 1953, c. 159, 67 Stat. 90, 93, Section 203 (22 D.C. Code 201) provides in pertinent part:

Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; \* \* \*.

#### STATEMENT

Separate and unrelated indictments were returned in the District of Columbia charging appellee, a licensed physician, and Shirley Boyd, a nurse's aide, with violations of the District of Columbia abortion law, 22 D.C. Code 201.<sup>2</sup> Each defendant made a pre-trial motion to dismiss, and the district court consoli-

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<sup>2</sup> Two indictments were returned against appellee (App. 2-3), each in two counts. One indictment charged him with procuring or producing an abortion on one Inez Fradin on or about February 1, 1968 and with attempting to procure or produce the same abortion. The other indictment charged similar offenses on May 1, 1968, as to one Nancy Russell.

dated the cases.<sup>3</sup> After receiving briefs and hearing argument, the court dismissed the indictments against appellee but denied the motion to dismiss as to Miss Boyd.<sup>4</sup>

Noting the statutory phrase "necessary for the preservation of the mother's life or health", and that the word "health" itself was nowhere defined in the statute, the district court was of the view that the word health was "so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health" (App. 7). The court further found that the physician contemplating the performance of an abortion was placed in a "particularly unconscionable position" in the light of interpretations of the statute by the District of Columbia Court of Appeals to the effect that once the government proves that an abortion had been performed by a physician, the burden shifts to the physician to justify his acts. Given

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<sup>3</sup> Appellee's motion was based upon the decision in *People v. Belous*, 80 Cal. Rptr. 354, 458 P. 2d 194, certiorari denied, 397 U.S. 915, in which a divided court held that the statutory exception to the scope of California's then applicable provision prohibiting abortions "unless the same is necessary to preserve [the woman's] life" was unconstitutionally vague.

<sup>4</sup> The district court refused to dismiss the indictment as to non-physician Boyd on the ground that there was "ample evidence \* \* \* that infection and death still often attend clumsy, unskilled terminations of pregnancy performed by non-physicians" and, accordingly, that "it was and still is well within the police power of the Congress to outlaw abortions that are not performed under a 'competent', that is, a qualified, licensed practitioner of medicine" (App. 6-7). The court found the statute's proscription of abortions by non-physicians severable from the portion found to be infirm (App. 8-9).

this interpretative gloss on the statute, the district court concluded that (App. 7):

[The physician] is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. \* \* \* The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word "health" should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court.

In addition the court noted (App. 8) that other uncertainties in the act's phraseology had been fully analyzed in *People v. Belous*, 80 Cal. Rptr. 354, 458 P. 2d 194, certiorari denied, 397 U.S. 915.

In reaching its decision that the "necessary for the preservation of the mother's life or health" portion of the abortion statute was unconstitutionally vague, the court did not pass on the other constitutional attacks on the statute. Noting in passing that the statute "unquestionably impinges to an appreciable extent on significant constitutional rights of individuals" and that the right of privacy as delineated in recent opinions of this court might well include the right to remove an unwanted child in the early stages of pregnancy (App. 8), the court acknowledged that the "unqualified right to refuse to bear children" has limitations and that Congress could undoubtedly regulate abortion practice in "many ways" (App. 9-10).

## ARGUMENT

## INTRODUCTION AND SUMMARY

In declaring part of the District of Columbia abortion statute unconstitutionally vague, the district court has created a situation where any licensed physician in the District of Columbia may perform an abortion on a pregnant woman who desires it for any reason whatsoever. The unconditional availability of abortions, unrelated to medical justification, is contrary to the manifest intent of Congress in enacting the instant statute and is at odds with the abortion statutes of many States. It is therefore important for this Court to review the decision of the district court.

## A

Our examination of the history of the Criminal Appeals Act and the decisions of this Court has led us to conclude that the Court has jurisdiction over this appeal. The explicit language of the Act coupled with dicta in *Carroll v. United States*, 354 U.S. 394, 411, make clear that the Act encompasses appeals from the District Court for the District of Columbia. Furthermore, we are of the opinion that the term "statute" in the Act clearly applies to the District of Columbia abortion statute adopted by Congress in 1901. No basis exists for exempting from the coverage of 18 U.S.C. 3731 legislation passed by Congress and approved by the President, but applicable only to the District of Columbia. This Court's recent decision in *Shapiro v. Thompson*, 394 U.S. 618, holding that the term "Act of Congress" as used in the three-judge court statute, 28 U.S.C. 2282, encompasses acts of

Congress applicable only to the District of Columbia is dispositive. The term "statute" in the Criminal Appeals Act is certainly at least as broad as the phrase "Act of Congress" in the three-judge court statute.

Although *Carroll v. United States*, *supra*, 354 U.S. at 411, had seemed to settle that, where applicable, the "explicit terms" of the Criminal Appeals Act would govern to the exclusion of the general District appeals statute, 23 D.C. Code 105, the Court's recent decision in *United States v. Sweet*, No. 577, O.T., 1969, decided June 29, 1970, has cast some doubt on the issue with respect to appeals involving the validity of statutes applicable only in the District of Columbia. *Sweet* seems to hold that, in such a case, the Criminal Appeals Act does not supersede the D.C. Code provision and that an appeal taken pursuant to the local statute to the Court of Appeals for the District of Columbia Circuit cannot be transferred here. We submit, however, that once a direct appeal covered by the Criminal Appeals Act is properly filed here, this Court must accept jurisdiction, lacking any discretionary power to transfer or dismiss the appeal.

### B

While we believe this court has jurisdiction, we note at the outset that the traditional restraint exercised by this Court in deciding constitutional questions and the narrow scope of review authorized by the Criminal Appeals Act, 18 U.S.C. 3731, both operate to limit the issues properly before this Court. Although several broad constitutional issues were presented to the court below by an *amicus curiae*, see

*infra*, pp. 22-23, the district court's decision was based solely on a finding that the abortion statute was unconstitutionally vague. In view of this Court's conclusions in *United States v. Automobile Workers*, 352 U.S. 567, 589-590, we argue that it would be inappropriate to reach the broader issues not fully considered below and not presented in the context of a fully developed factual record. We also discuss decisions under the Criminal Appeals Act which raise substantial questions as to this Court's jurisdiction to consider such broader issues.

Turning to the vagueness issue decided by the district court, we believe it was error to declare the abortion statute unconstitutional on its face where there may well exist a substantial class of situations to which the statute may apply and where the record does not disclose whether appellee had any doubts as to whether his conduct was proscribed by the statute. This case is not within the reach of *Dombrowski v. Pfister*, 380 U.S. 479, and other First Amendment cases where overbroad statutes were struck down for their "chilling effect" on the rights of free expression of third parties. Before finding the phrase "necessary for the preservation of the mother's life or health" lacking in adequate precision, the district court should at least have awaited clarification as to whether appellee made a medical judgment that the abortion he allegedly performed was necessary to preserve the mother's health.

On the merits, we suggest that the District of Columbia abortion statute should be interpreted to allow a defense of good faith on the part of the physician

performing an abortion. While a decision of the Court of Appeals for the District of Columbia Circuit goes so far as to note that as a practical matter the good faith of a physician will always create a reasonable doubt as to whether the statutory standard was violated, *Williams v. United States*, 138 F. 2d 81, we suggest that this Court should make clear that good faith is a complete defense. Such a ruling would effectively shield doctors performing abortions from prosecution as long as they made a good faith professional judgment that the abortion was justified.

Finally, when the District abortion statute is interpreted so as not to interfere with a physician's good faith judgment, the phrase "necessary for the preservation of the mother's life or health" is not fatally defective. The word "health" distinguishes this case from the statute found unconstitutionally vague in *People v. Belous*, 80 Cal. Rptr. 354, 458 P. 2d 194, certiorari denied, 397 U.S. 915, and calls for a medical judgment well within the professional competence of physicians to make.

#### I. THE COURT HAS JURISDICTION OVER THIS APPEAL

In order to determine whether this Court has jurisdiction over this case under the Criminal Appeals Act, two questions must be answered: First, is the District Court for the District of Columbia one of the "district courts" referred to in the Act? and, second, is the abortion statute in question, passed by Congress and approved by the President, a "statute" within the meaning of the Act? If, as we urge, both questions must be answered in the affirmative, the further questions are

presented as to whether the government could, nevertheless, have appealed to the Court of Appeals for the District of Columbia Circuit pursuant to 23 D.C. Code 105 and, if so, whether this Court, accordingly, should abstain from exercising jurisdiction under the Criminal Appeals Act.

## A

Until 1907, the United States had no right of appeal in criminal cases tried in federal courts outside of the District of Columbia. See *United States v. Sanges*, 144 U.S. 310. To remedy this situation, a bill was introduced in the House of Representatives in 1906 adopting the language of Section 935 (the predecessor of 23 D.C. Code 105) of the District of Columbia Code of 1901, which had given the government "the same right of [appeal] that is given to the defendant." See H. Conf. Rep. No. 8113, 59th Cong., 2d Sess. The proposed legislation was designed to extend the "provision of the code of the District of Columbia to all districts in the United States," H. Rep. No. 2119, 59th Cong., 1st Sess. 2. The final Criminal Appeals Act which emerged as law in 1907 rejected the District provision in favor of language restricting the government's right of appeal to narrowly defined instances and providing for a direct appeal to this Court from decisions of "district or circuit courts."<sup>4,5</sup>

In 1933, this Court held that the term "district

<sup>4</sup> For a discussion of the legislative history of the Criminal Appeals Act, see *United States v. Sisson*, No. 305, O.T., 1969, decided June 29, 1970, slip op. at 24-27; *Carroll v. United States*, 354 U.S. 394, 402, n. 11.

court", as used in the Criminal Appeals Act, did not encompass the Supreme Court of the District of Columbia (the trial court of the District) notwithstanding a section in the District of Columbia Code providing that the Supreme Court of the District "shall possess the same powers and exercise the same jurisdiction as the district courts of the United States." *United States v. Burroughs*, 289 U.S. 159, 163. When the Criminal Appeals Act was amended in 1942 to provide for appeals to the circuit courts of appeals, specific reference was made to, and the same jurisdiction conferred upon, the "United States Court of Appeals for the District of Columbia." 56 Stat. 271. In the same statute, Congress included a separate provision giving the United States Court of Appeals for the District of Columbia power to review judgments of the (by then created) District Court of the United States for the District of Columbia in criminal cases on appeals taken by the United States "in cases where such appeals are permitted by law." 56 Stat. 272.\*

The legislative history of the 1942 amendment casts no light upon—indeed includes no discussion of—this aspect of the law which for the first time brought the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia within the Criminal Appeals Act. Similarly there is no mention of any *limitation* on the jurisdiction conferred upon this Court when

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\* Specific reference in the Criminal Appeals Act to the United States Court of Appeals for the District of Columbia was eliminated by an amendment in 1949, 63 Stat. 97, which altered the language of the statute to conform to the changed nomenclature of the courts (*i.e.*, "courts of appeals" for "circuit courts." 62 Stat. 991; see also 63 Stat. 107, now 28 U.S.C. 451).

the appeal is from the dismissal of an indictment based upon the invalidity or construction of a local District of Columbia statute. On the contrary, it seems to have been assumed that the United States courts for the District of Columbia were not distinguishable from the other United States district and appellate courts insofar as appeals by the United States in criminal cases are concerned. See H. Rep. No. 45 and S. Rep. No. 868, 77th Cong., 1st Sess.; H. Conf. Rep. No. 2052, 77th Cong., 2d Sess. Indeed, it is now well settled that, since the 1942 amendments, the Criminal Appeals Act applies to decisions of the United States District Court of the District of Columbia. *United States v. Hoffman*, 161 F. 2d 881, 882-883 (C.A.D.C.), jurisdiction upheld on certification to this Court and decided on the merits, 335 U.S. 77. See also *Carroll v. United States*, 354 U.S. 394, 411; *United States v. Bramblett*, 348 U.S. 503; *United States v. Waters*, 175 F. 2d 340 (C.A.D.C.).

### B

Given that the District Court for the District of Columbia is one of the "district courts" covered by the Criminal Appeals Act, we turn to the second question—whether a judgment holding unconstitutional a statute applicable only to the District of Columbia is a "decision \* \* \* based upon the invalidity or construction of the statute upon which the indictment \* \* \* is founded" within the purview of the Act, in which case the Act provides for a direct appeal to this Court. If, on the other hand, statutes applicable only to the District of Columbia do not fall within the quoted language, an appeal in this case to the Court of

Appeals for the District of Columbia circuit is authorized under the third and fourth quoted paragraphs of Section 3731, set forth on pp. 2-3, *supra*.

The literal language of Section 3731 clearly includes statutes limited in operation to the District of Columbia. In *United States v. Waters*, 175 F. 2d 340, appeal dismissed on motion of the United States, 335 U.S. 869, the Court of Appeals for the District of Columbia certified a case involving the validity of a local District statute to this Court for direct review under Section 3731, although the possibility that the direct review provisions of Section 3731 might not be applicable was not averted to.

While this Court has not dealt directly with the applicability of the Criminal Appeals Act to statutes of local application only, it has ruled that a constitutional challenge to an act of Congress applicable only to the District of Columbia must be heard by a three-judge court under 28 U.S.C. 2282, which provides that an action to enjoin the operation of an "Act of Congress" must be considered by such a court. *Shapiro v. Thompson*, 394 U.S. 618, 625, n. 4. Before that decision there had been some doubt as to whether this was a necessary construction of Section 2282. In *Ex parte Cogdell*, 342 U.S. 163, this Court had raised a question as to whether the three-judge statute governed where the act under attack applied only in the District of Columbia. Presumably, it was thought that the situation might be analogous to decisions under 28 U.S.C. 2281, holding that local ordinances and the like were not "statutes" of a state so as to require a three-judge court when constitutionality was challenged in an action to enjoin enforcement of the provisions. See

*Moody v. Flowers*, 387 U.S. 97, 101, and earlier decisions there cited.' In *Shapiro v. Thompson*, however, the Court resolved the issue saying (394 U.S. at p. 625, n. 4) :

Section 2282 requires a three-judge court to hear a challenge to the constitutionality of "any Act of Congress." (Emphasis supplied.) We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia.\*

There is no more basis for reading an exception into the Criminal Appeals Act, which is, by its terms applicable to "all criminal cases"—not just to those arising under a statute of general applicability. Indeed, the term "statute" used here is arguably more broadly inclusive than "Act of Congress." At all events, many criminal statutes of the United States have only limited territorial applications. See *e.g.*, 18

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\* In construing its jurisdiction under 28 U.S.C. 1254(2), 1257(1) and 1257(2), which allow appeals from decisions involving the constitutionality of "State statute[s]", "statute[s] of the United States" and "statute[s] of any state," respectively, this Court has consistently given those terms broad scope. See Stern & Gressman, *Supreme Court Practice*, pp. 31-34, 80-87 (4th ed. 1969).

\* In *Berman v. Parker*, 348 U.S. 26, the Court had considered the constitutionality of a District of Columbia statute in an appeal under 28 U.S.C. 1253 from a decision of a three-judge court.

\* Thus, the Criminal Appeals Act might authorize direct appeal to this Court of a judgment dismissing a criminal case for invalidity of a statute enacted by a local legislature if the prosecution were instituted by the United States in a United States district court. That procedure was not appropriate in *District of Columbia v. Thompson Co.*, 346 U.S. 100, because the prosecution in that case was initiated by the District government itself in its own municipal court.

U.S.C. 1111 and 1112, punishing homicide "[w]ithin the special maritime and territorial jurisdiction of the United States" and 18 U.S.C. 1151-1160, dealing with Indian territory. So long as Congress legislates for the District of Columbia and prosecutions under the D.C. Code are brought by the United States in the District Court of the United States for the District of Columbia, we see no basis on which a decision of the district court dismissing an indictment predicated on the construction or invalidity of what is undoubtedly a "statute", duly enacted by both Houses of the federal Congress, and signed by the President, can be deemed outside the scope of the Criminal Appeals Act.<sup>10</sup>

*C*

Assuming, as we believe we have established, that the Criminal Appeals Act authorizes a direct appeal in this case to this Court, the possibility that the Court of Appeals for the District of Columbia Circuit has concurrent jurisdiction pursuant to 23 D.C. Code 105 must be analyzed. That provision, which was adopted as part of the D.C. Code of 1901 some six years prior to the adoption of the Criminal Appeals Act, gives the gov-

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<sup>10</sup> An analogous situation has been considered by the High Court of Australia. Similar to Congress, the Australian Parliament has, in addition to its authority to pass laws of a general nature affecting the entire Commonwealth of Australia, specific authority to pass laws applicable in individual territories not included in the Australian States. In *Lamshed v. Lake*, 99 C.L.R. 132, 138-148 (Dixon, C.J.), the High Court made it clear that a law passed by Parliament pursuant to its power to legislate for individual territories was a "law of the Commonwealth" entitled to the same respect as laws passed pursuant to Parliament's general legislative powers.

ernment, subject to an exception not here relevant, "in all criminal prosecutions \* \* \* the same right of appeal that is given to the defendant." Act of March 3, 1901, c. 854, 31 Stat. 1189, 1341, Section 935.<sup>11</sup>

As we have already noted, *supra*, pp. 11-12 this Court determined in 1933 that the Criminal Appeals Act as originally enacted did not apply to appeals from the courts in the District of Columbia as those courts were not "district courts" within the meaning of the Act, *United States v. Burroughs*, 289 U.S. 159. Instead, such appeals continued to be governed solely by the predecessor of 23 D.C. Code 105 (289 U.S. at 162). See also *United States v. Sweet*, No. 577, O.T., 1969, decided June 29, 1970. With the amendment of the Criminal Appeals Act in 1942 to include appeals from the District Court of the District of Columbia, however, see pp. 12-13, *supra*, the Act and the District appeals provision overlapped.

This overlap was not discussed by either the court of appeals or this Court in *United States v. Hoffman*, 161 F. 2d 881, jurisdiction upheld on certification to this Court and decided on the merits, 335 U.S. 77, a case involving the construction and validity of the Emergency Price Control Act of 1942. The relationship between the two appeals statutes was, however, the subject of a lengthy discussion in *Carroll v. United*

<sup>11</sup> Other than a very general statement in the House Report on the D.C. Code of 1901 that many provisions of the Code were drawn from the laws of other States, H. Rep. No. 1017, 56th Cong., 1st Sess., the legislative history of the District appeals statute contains no indication as to why the government was given the right of appeal. Presumably, as this Court has noted, the draftsmen of the Code were influenced by the fact that similar provisions were in effect in many other States. See *Carroll v. United States*, 354 U.S. 394, 410.

*States*, 354 U.S. 394, where the Court concluded that (354 U.S. at 411)—

appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U.S.C. § 3731, although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of [23 D.C. Code 105] [citing *Hoffman*].

This statement seemed to settle the matter for situations with respect to which the two statutes overlapped: the Criminal Appeals Act would control. And we would stop here if it were not for the Court's recent ruling in *Sweet*, *supra*.

Whether the *Carroll* rationale applies where the underlying statute operates only in the District of Columbia has been placed in some doubt by the *Sweet* decision. In *Sweet*, the government had appealed to the court of appeals under 23 D.C. Code 105 from the dismissal of an indictment charging Sweet with various crimes under the D.C. Code. Believing that a direct appeal to this Court under the Criminal Appeals Act was appropriate, the court of appeals certified the case to this Court. In finding certification unauthorized, the Court noted that the court of appeals had made no determination that it lacked jurisdiction to hear the government's appeal. This observation in *Sweet* would seem to suggest, at the least, that the Criminal Appeals Act and the District appeals provision may offer the government the choice of alternative appellate forums in cases involving the validity of statutes of local applicability only. If this Court should now elaborate upon the apparent suggestion in *Sweet* and hold that, indeed, the government could have taken this appeal to the court of

appeals in the first instance, the final question arises as to whether the Court can or should decline to exercise its Criminal Appeals Act jurisdiction.

There are understandably appealing arguments for the proposition that appeals involving the validity of acts of Congress applicable only in the District of Columbia should be taken in the first instance to the Court of Appeals for the District of Columbia Circuit and that accordingly any such appeals brought directly to this Court under the Criminal Appeals Act should be dismissed. Recognizing that statutes or rules which are of only local effect ordinarily do not give rise to issues of national policy, this Court has on occasion deferred to decisions of the court of appeals based on interpretations of local District statutes or rules of law. See *Griffin v. United States*, 336 U.S. 704, 712-718, *District of Columbia v. Pace*, 320 U.S. 698, 702, *Del Vecchio v. Bowers*, 296 U.S. 280, 285. This deferment policy has yielded, however, both where statutory interpretation questions are "so enmeshed with constitutional issues that complete disposition by this Court is in order," *District of Columbia v. Little*, 339 U.S. 1, 4, n. 1; *Kent v. United States*, 383 U.S. 541, 557, n. 27; and where "application of the District Code has an impact not confined to the Potomac's shores, but reaching far beyond." *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 556. See also, Stern & Gressman, *Supreme Court Practice*, pp. 185-189 (4th ed. 1969). In *General Motors*, the Court was primarily concerned that the interpretation given by the court of appeals to the District provision apportioning taxes on interstate businesses would create substantial dangers of multiple taxation;

accordingly, this Court interpreted the statute to avoid such dangers. While none of the above cases involved direct appeals to this Court, they do point out the instances where consideration in this forum of issues raised by local statutes may be appropriate.<sup>12</sup>

A decision finding the District abortion statute unconstitutionally vague is, we submit, not merely of local significance. It involves a general question of constitutional law, applicable throughout the United States. The significance of the decision in this case is not "confined to the Potomac's shores", but will lay down a rule for the Nation, with immediate applicability to many other States, where similar abortion provisions are under attack.

Beyond these policy considerations, however, we contend that the procedural statutes as written do not leave this Court discretion to decline to exercise the jurisdiction conferred upon it by the Criminal Appeals Act, even should it be decided that the appeal could have been taken to the court of appeals in the first instance under 23 D.C. Code 105. A review of the history of the appellate jurisdiction of this Court, see Hart and Wechsler, *The Federal Courts and the Federal System*, pp. 1313-1321 (1953), discloses that only in the limited sense of rejecting cases obviously without merit or involving no substantial federal question, has this Court construed its duty to review cases within its obligatory jurisdiction as "discretionary."

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<sup>12</sup> Cf. *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, where this Court granted certiorari to construe an Alaskan statute which, because of the inducement of the Social Security Act of 1935, had provisions similar to those in statutes of 43 States and territories.

Well before the Judiciary Act of February 13, 1925, 43 Stat. 936, eased the burden on this Court's docket by restricting the obligatory jurisdiction of the Court while proportionally expanding the classes of cases within its discretionary power of review, the Court developed the practice of dismissing appeals from state courts where no substantial federal questions were presented. See, *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311; *Zucht v. King*, 260 U.S. 174, 176. This technique, now embodied in Rule 15 (1) (e) and (f) and applied, as well, to appeals from federal courts which are obviously without merit (where summary affirmance rather than dismissal is appropriate), is currently used to dispose of well over one-half of the appeals brought to this Court. See Stern & Gressman, *supra*, p. 194. This limited "discretion" to handle appeals summarily, however, does not lend support to the proposition that the Court can refuse to exercise jurisdiction duly conferred upon it by Congress.<sup>13</sup> To the contrary, Mr. Justice Douglas, in his dissent in *Linehan v. Waterfront Commission*, 347 U.S. 439, has warned against expanding the summary practice so as to dilute the "right" of appeal that "Congress carved out" in certain specified cases. See also, Mr. Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541, 546 (1958).

<sup>13</sup> Different considerations, not applicable to appeals cases, have led this Court to decline to exercise jurisdiction over cases admittedly within its original jurisdiction where other more appropriate forums are available. See *Massachusetts v. Missouri*, 301 U.S. 1, 19-20; *Louisiana v. Cummins*, 314 U.S. 580; *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 464-465, and dissent 469-470. Similar considerations led to the denial of the government's motion for leave to file complaints in *United States v. Alabama*, 382 U.S. 897.

Nothing in the Criminal Appeals Act or its legislative history, suggests that Congress intended the Act to be construed—wholly inconsistently with the construction given other appeals statutes—to confer upon this Court the discretionary power to decline to exercise jurisdiction. Indeed, the wording of the Act—“[a]n appeal *may* be taken by and on behalf of the United States \* \* \*” (emphasis added)—suggests that the choice of forum, if any, lies with the United States. Finally, the transfer provision of the Act seems no more available here than it was in *Sweet, supra*; it operates only when, *according to the statute*, the appeal should have been taken to the other court *under the Act*. That is not the present situation. We therefore conclude that the Court should exercise its jurisdiction over this appeal.

## II. THE DISTRICT COURT ERRED IN HOLDING THE ABORTION STATUTE UNCONSTITUTIONALLY VAGUE ON ITS FACE

### A. *Only the vagueness issue is properly before the Court on this appeal*

In moving to dismiss the indictments, appellee relied primarily on the alleged unconstitutional vagueness of the abortion statute. Although other constitutional challenges were presented to the court by an *amicus curiae*,<sup>14</sup> the district court's decision was based

<sup>14</sup> The American Civil Liberties Union Fund was permitted to file a brief as *amicus curiae*, in support of defendants' motions to dismiss (D.C. D.C. Nos. 1587-69, 1044-68). In that brief, in addition to urging the vagueness point, the A.C.L.U. argued that (1) the “challenged statute is an arbitrary invasion of the fundamental right of a woman to determine when to bear offspring,” (2) the “statute is an arbitrary invasion of the right of the physician to prescribe for his patient in accordance with his best pro-

solely upon the vagueness issue. In these circumstances, it would be inappropriate for the Court to extend its inquiry to consider the additional challenges. *United States v. Automobile Workers*, 352 U.S. 567, 589-590. This is particularly true where, as here, many of those issues—such as the asserted infringements by the abortion statute of the “fundamental right” of women not to bear children—would necessitate consideration of largely unexplored and difficult constitutional questions on a record barren of facts.

In the *Automobile Workers* case, the district court had dismissed an indictment against certain union officials (for alleged unlawful expenditures of union funds in connection with a congressional campaign) on the grounds that the indictment did not state an offense. On direct appeal under the Criminal Appeals Act, this Court held that the indictment did charge an offense, but declined to reach numerous other constitutional attacks on the statute proffered by the union officials. In passages equally applicable to the instant case, the Court stated (352 U.S. at 590, 591-592):

The impressive lesson of history confirms the wisdom of the repeated enunciation, the variously expressed admonition, of self-imposed inhibition against passing on the validity of an

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professional knowledge,” (3) “[t]here is no compelling state interest sufficiently strong to justify the prohibition of abortion by a licensed physician on a woman who desires the abortion,” (4) the “statute violates the due process clause of the Fifth Amendment \* \* \* on its face and in its application,” and (5) the “statute is based upon religious theory and thus is a law respecting an establishment of religion and in violation of the Constitution.”

Act of Congress "unless absolutely necessary to a decision of the case."

\* \* \* \* \*

Refusal to anticipate constitutional questions is peculiarly appropriate in the circumstances of this case. First of all, these questions come to us unilluminated by the consideration of a single judge—we are asked to decide them in the first instance. Again, only an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision. Finally, by remanding the case for trial it may well be that the Court will not be called upon to pass on the questions now raised. Compare *United States v. Petrillo*, 332 U.S. 1, 9 *et seq.*, with the subsequent adjudication on the merits in *United States v. Petrillo*, 75 F. Supp. 176.

Similar restraint was exercised in *United States v. Spector*, 343 U.S. 169, 172, and *United States v. Petrillo*, 332 U.S. 1, 9–11, both on direct appeal under the Criminal Appeals Act, where this Court reversed district court holdings that congressional statutes were unconstitutionally vague, but refused to consider other constitutional questions.

The Criminal Appeals Act itself, 18 U.S.C. 3731, imposes barriers to the consideration of divergent constitutional issues on direct review. As stated in *United States v. Borden Co.*, 308 U.S. 188, 193:

When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond

the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the entire case.

*Borden* was cited with approval when this Court in *Petrillo* (332 U.S. at 5) refused to reach issues concerning the appropriate construction to be given an indictment (issues which would not have been directly appealable by the government to this Court). Similar questions exist as to whether this Court has jurisdiction under 18 U.S.C. 3731 to consider constitutional questions which might have been subject to direct review but were not passed on by the district court. See *United States v. Blue*, 384 U.S. 251, 256; Stern and Gressman, *Supreme Court Practice*, 41-42 (4th ed. 1969); Friedenthal, *Government Appeals in Federal Criminal Cases*, 12 Stan. L. Rev. 71, 97-100 (1959). In this case, the district court decided only the vagueness issue. If the government should prevail on that issue, the cause should be remanded to the lower court for such consideration of the other constitutional attacks on the indictment as may be appropriate. Should the district court sustain the indictment against such attacks or at least defer its decision thereon until after a trial, any appeal by appellee would lie with the court of appeals, which court would then have the benefit of a fully developed record. Even if the district court should immediately decide the broader constitutional issues against the government,

this Court would at least have had the benefit of a full analysis of the issues by the district judge.<sup>15</sup>

*B. The district court's ruling that the abortion statute is vague, which was rendered prior to the development of a factual context, was premature and erroneously accorded standing to appellee to challenge the statute on its face*

Before examining the district court's reasoning in finding the abortion statute unconstitutionally vague, we urge that the district court was in error in invalidating *on its face* that portion of the District of Columbia statute fixing standards for the performing of abortions by physicians. The court's ruling in effect accorded to appellee a degree of "standing" which this Court has found to be warranted only in the context of certain First Amendment cases, where the departure from the normal rule of testing the validity of statutes as applied is deemed justified by the need to curtail the "chilling effect" of such a statute on the rights of free expression of third parties. See, *e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 486-489; *Thornhill v. Alabama*, 310 U.S. 88, 96-98; see also Jurisdictional Statement in *United States v. 37 Photographs*, No. 1475 O.T., 1969, pp. 9-11. Where, as here, First Amendment rights of expression are not at stake,<sup>16</sup> there is no

<sup>15</sup> The situation in this case is to be distinguished from one where an appellee seeks to invoke, in support of the conclusion reached by the district court, a constitutional ground (which also would be available to the government on direct appeal) fully considered but rejected by the court below. See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 330.

<sup>16</sup> It might be argued that the mere existence of the allegedly vague abortion statute deters doctors from performing abortions where therapeutically necessary and that such deterrence brings the case within the "chilling effect" doctrine, particularly where

justification for deviating from this Court's sound principle that a statute should not be declared vague "on its face" where there exists a substantial class of situations to which the statute may validly be applied. *United States v. National Dairy Corp.*, 372 U.S. 29, 36; *United States v. Raines*, 362 U.S. 17, 21; *United States v. Petrillo*, 332 U.S. 1, 7; *United States v. Wurzbach*, 280 U.S. 396; see also, Amsterdam, Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 100-104 (1960); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599, 617-620 (1962). As said in the *National Dairy Corp.* case (372 U.S. at 32-33):

Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States v. Harriss*, 347 U.S. 612, 617 (1954). In deter-

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constitutional rights of women may be involved. Indeed, in finding that the statute failed to give physicians sufficient guidelines to determine whether a given abortion would be proscribed by the statute, the district court found the "ambiguities" particularly subject to criticism in view of the statute's impact on "significant constitutional rights of individuals" (App. 8). We submit, however, that there is no evidence in this case that the District of Columbia abortion statute deterred doctors from performing therapeutically necessary abortions. The present case is thus quite dissimilar from *Dombrowski* where the record clearly established that the statute there in question was being deliberately utilized by state officials to interfere with First Amendment rights. Finally, a voiding of the abortion statute to vindicate the constitutional rights of women obviously cannot be justified until the existence and limitations of such rights have been fully adjudicated. The constitutional claims to those rights, as we have argued, *supra*, pp. 22-26, are not in issue on this appeal.

mining the sufficiency of the notice a statute must of necessity be examined *in the light of the conduct with which a defendant is charged*. [Emphasis supplied.]

In declaring the District of Columbia abortion statute unconstitutionally vague prior to the development of a factual framework (whether by evidence at trial, a bill of particulars or stipulation of facts"), the district court departed from the sound teachings of these authorities. The present record does not indicate, for example, whether this case raises the problems—deemed critical by the district court—which relate to situations in which a licensed physician purports to exercise medical judgment as to whether an abortion should be performed. The district court was concerned that the statute provided the physician with no guidelines to exercise that judgment, permitting a lay jury to second guess him in a later criminal prosecution (App. 7-8).

The court's concern was plainly premature. It is evident that there may be many cases in which no such question comes to the surface because the defendant, although a licensed physician, does not exercise medical judgment.<sup>17</sup> If a physician, for example, performs an abortion on a woman whom he has never seen before and whom he has not examined beyond establishing the fact of pregnancy, he clearly would not be

<sup>17</sup> See *United States v. Halseth*, 342 U.S. 277.

<sup>18</sup> The very absence of decisions interpreting the instant statute, notwithstanding the "many prosecutions" thereunder noted by the district court (App. 5), suggests that most prosecutions were based on situations where no close questions of medical judgment were presented.

exercising the medical judgment required by the statute to determine whether the abortion was "necessary for the preservation of the mother's life or health."<sup>19</sup> His "hard-core" conduct would obviously be prohibited under any construction of the statute, see *Domkowski v. Pfister*, 380 U.S. 479, 491-492, and he accordingly could not validly claim that the statute, as applied to him, did not give him fair warning that such conduct was proscribed.

Since, in the absence of any evidence, there was nothing to indicate that the defendant exercised any medical judgment, the district court's decision was premature. Accordingly, we submit that the decision below should be vacated and the case remanded for reinstatement of the indictments.<sup>20</sup>

<sup>19</sup> Leaving aside, of course, the case of a specialist who performs an abortion relying upon the representation of the patient's doctor that the operation is therapeutically justified.

<sup>20</sup> Such a course would not necessarily have the effect of merely postponing this Court's consideration of the merits of the vagueness ruling, even assuming that the district court were to re-issue its opinion verbatim following the development of facts which it deemed sufficient to give standing to appellee to raise a valid vagueness attack. Thus, if the district court were to grant appellee's motion to dismiss at the conclusion of the government's case, there would be no right to appeal under 18 U.S.C. 3731. See *United States v. Sisson*, No. 305, O.T., 1969, slip op. pp. 37-38, decided June 29, 1970. In any event, this course is warranted by the strong possibility that a remand would obviate the need for the federal courts to pass upon the questions now. See *United States v. Automobile Workers*, 352 U.S. 567, 591-592, quoted *infra*, pp. 23-24; *United States v. National Dairy Corp.*, 372 U.S. 29.

*C. The District of Columbia abortion statute is not unconstitutionally vague*

If this Court rejects our contention that appellee cannot appropriately attack the abortion statute on its face, it is necessary to reach the merits of the district court's holding that the statute is unconstitutionally vague.

1. *This Court should follow its longstanding policy of interpreting acts of Congress so as to avoid, where feasible, constitutional attacks thereon.*—Except for a very few cases dealing with statutes outlawing certain agreements and associations in restraint of trade,<sup>21</sup> we are unaware of any holdings of this Court voiding a federal statute for vagueness.<sup>22</sup> The situation is, of course, different with respect to state statutes. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479; *Winters v. New*

<sup>21</sup> See, e.g., *United States v. L. Cohen Grocery Co.*, 255 U.S. 81.

<sup>22</sup> For cases rejecting attacks on federal statutes for vagueness, see, e.g., *Rowan v. Post Office Dept.*, No. 399, O.T., 1969, decided May 4, 1970; *Roth v. United States*, 354 U.S. 476; *United States v. Korpan*, 354 U.S. 271; *United States v. Harriß*, 347 U.S. 612; *United States v. Kahriger*, 345 U.S. 22; *United States v. Spector*, 343 U.S. 169; *Dennis v. United States*, 341 U.S. 494; *Jordan v. De George*, 341 U.S. 223; *American Communications Ass'n v. Douds*, 339 U.S. 382; *United States v. Petrillo*, 332 U.S. 1; *Screws v. United States*, 325 U.S. 91; *United States v. Ragen*, 314 U.S. 513; *United States v. Darby*, 312 U.S. 100; *Gorin v. United States*, 312 U.S. 19; *Shields v. Utah I. Cent. R.R.*, 305 U.S. 177; *Kay v. United States*, 303 U.S. 1; *United States v. Wurzbach*, 280 U.S. 396; *United States v. Alford*, 274 U.S. 264; *Baltimore & O. R.R. v. Groeger*, 286 U.S. 521; *Mahler v. Eby*, 264 U.S. 32; *Nash v. United States*, 229 U.S. 373; *Ex Parte Webb*, 225 U.S. 663. Compare *United States v. Evans*, 333 U.S. 483 and *United States v. Cardiff*, 344 U.S. 174, where this Court urged Congress to remedy the ambiguities in the statutes there involved. For a thorough

*York*, 333 U.S. 507; *Lanzetta v. New Jersey*, 306 U.S. 451. At least a partial explanation for this apparent discrepancy lies in this Court's role with respect to federal statutes as the final arbiter not only as to constitutionality, but as to their scope and meaning as well.<sup>23</sup> When faced with a constitutional attack on a federal statute, this Court is not confronted with a fixed interpretative decision of some state court, but is at liberty to examine and construe the statute so as to avoid alleged constitutional infirmities. *United States v. Harriss*, 347 U.S. 612, 618; *Schneider v. Smith*, 390 U.S. 17, 24-27. On occasion, in fact, the Court has gone to great lengths to provide a workable constitutional definition to rather broad or uncertain statutory language. *Roth v. United States*, 354 U.S. 476; *United States v. Harriss*, *supra*; *United States v. CIO*, 335 U.S. 106; *Screws v. United States*, 325 U.S. 91. Cf. *Welsh v. United States*, No. 76, O.T., 1969, decided June 15, 1970.

The fact that the statute involved in this case applies only to the District of Columbia, does not deprive this Court of its interpretative powers. While,

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examination of this Court's role in construing allegedly vague federal statutes, see Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. L. Rev. 67, 69-71, 81-85 (1960).

<sup>23</sup> Mr. Justice Jackson articulated a related consideration in his opinion in *United States v. Five Gambling Devices*, 346 U.S. 441, 449: "This Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power."

as we have noted, see *infra*, pp. 19-20, this Court has on occasion deferred to decisions of the District of Columbia Court of Appeals interpreting local District statutes or rules of law, it has found it inappropriate to give such deference in cases where, as here, statutory interpretation questions are intertwined with constitutional issues. *District of Columbia v. Little*, 339 U.S. 1, 4, n. 1.

As we shall show, the District of Columbia abortion statute can reasonably be interpreted to meet appellee's attack on it for vagueness.

2. *The statute should be interpreted to allow a defense of good faith on the part of the physician performing the allegedly illegal abortion.*—The district court found that the abortion statute, 22 D.C. Code 201, did not protect from criminal penalty a licensed physician who asserted as a defense that he was proceeding in good faith and in the exercise of his professional judgment in performing the abortion. This conclusion followed from the court's reading of two decisions of the Court of Appeals of the District of Columbia—*Williams v. United States*, 138 F. 2d 81 and *Peckham v. United States*, 210 F. 2d 693, 697—as shifting, once the government had established the fact of abortion, the burden of proof to the physician to justify his acts. This shift resulted in the physician being "presumed guilty \* \* \* unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health" (App. 7). In the court's view, the "jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he

stands convicted of a felony," as his "professional judgment made in good faith should not be challenged" (App. 7).

In our view, the district court misread *Williams*. In that case, the Court of Appeals for the District of Columbia Circuit held that since there was a "manifest disparity in convenience of proof and opportunity for knowledge" as between the defendant and the government, the burden of introducing proof of justification of an abortion could constitutionally be shifted to the person who performed it; furthermore, the intent of Congress under the statutory exception was to "furnish the defendants an opportunity for justification," not to make lack of justification "part of the description of the offense itself." 138 F. 2d at 82-83. There is no indication in the *Williams* opinion that the burden of *persuading* the jury that the abortion was justified is placed on the accused physician. To the contrary, the Court of Appeals noted that "[u]nder the District of Columbia Code a competent physician who acts in good faith *will always* be in a position to come forward with a justification for any operation which he undertakes to preserve the life or health of his patient", 138 F. 2d at 84 (emphasis added); to be acquitted, such evidence, with or without other evidence, need only be "sufficient to create a reasonable doubt of guilt." *Ibid.*<sup>24</sup>

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<sup>24</sup> *Williams* was cited with apparent approval by this Court in *United States v. Fleischman*, 339 U.S. 349, 362, n. 9, which applied *Morrison v. California*, 291 U.S. 82, to justify placing on a defendant charged with wilful failure to comply with a congressional subpoena the burden of submitting proof that she had made a good faith effort to have the subpoenaed records

Nor, as the court below felt (App. 7), does the holding in *Williams* raise the Fifth Amendment problems analyzed in *Leary v. United States*, 395 U.S. 6, and *United States v. Gainey*, 380 U.S. 63. Both these cases involved due process attacks on statutory presumptions where the proof of one fact gives rise to a presumption of the existence of a fact which is an element of the offense charged. The Court applied the controlling test of validity articulated in *Tot v. United States*, 319 U.S. 463, 467, that "there be a rational connection between the facts proved and the fact presumed." The district court's citation of those two cases is inapposite. By placing the burden of producing evidence relating to justification on the physician, no presumption of an ultimate fact is involved as *Williams* rightly held that lack of justification was not an element of the abortion offense.<sup>25</sup> Thus, as justification is an affirmative defense, no "rational connection" need be shown between the fact of abortion and the absence of justification.<sup>26</sup>

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produced. The Court made it clear that it was not discussing the burden of persuasion, which remained on the government throughout, but only the burden of going forward with some evidence directed toward raising an affirmative defense peculiarly within the defendant's knowledge. 339 U.S. at 360-364.

<sup>25</sup> This interpretation of the statute was followed by the government in this case as the indictments alleged only that abortions had been committed or attempted and made no mention of the absence of justification (App. 2-3).

<sup>26</sup> At least one state court has construed its similar abortion statute to require the defendant to introduce proof of justification, whereupon the burden of persuasion shifts to the government to show the lack thereof. *State v. Orsini*, 155 Conn. 367, 232 A. 2d 907. Similarly, the *A.L.I., Model Penal Code*, Tent. Draft No. 9 (1959), Section 207.11 (included with minor changes

In placing the burden of producing justification evidence on the physician, while acknowledging that a conscientious physician will always be able to raise a "reasonable doubt" as to his guilt by such introduction, *Williams* went a long way toward establishing good faith of the attending physician as a defense to the crime of abortion.<sup>27</sup> This Court should now take the final step towards establishing the good faith defense.

Other states with abortion laws which do not contain an explicit exception for a good faith attempt at compliance have read in such a defense. *Kudish v. Board of Registration in Medicine*, 248 N.E. 2d

as Section 230.3 of *A.L.I. Model Penal Code*, Proposed Official Draft (1962)) recommended that justification for abortion be made an affirmative defense with the burden of persuasion remaining on the government. *Id.* at page 156. To the contrary are *State v. Dunkleberger*, 206 Iowa 971, 221 N.W. 592, and *State v. Riley*, 256 A. 2d 273 (Del. Super. Ct.), which require the prosecution to negative the existence of any justifying circumstances in its direct case.

<sup>27</sup> A recent decision of the District of Columbia Court of Appeals recognizes in a related context the inviolability of a doctor's judgment that grounds are present to justify an abortion. In its opinions in *Doe v. General Hospital*, No. 24,011, decided March 20 and May 15, 1970, the court granted interim relief, in a proceeding brought to compel the District of Columbia General Hospital to grant abortions to all women who desire them, by ordering the hospital to perform therapeutic abortions on the basis of an area mental health clinic psychiatrist's recommendation that mental health grounds were present. The earlier of the two decisions (slip op. 2-3) made it clear that the judgment of the psychiatrist was not subject to re-evaluation by a private consultant to the District of Columbia Department of Health.

264, 266 (Mass.);<sup>22</sup> *State v. Dunkleberger*, 206 Iowa 971, 221 N.W. 592; contra, *Adams v. State*, 200 Md. 133, 88 A. 2d 556. Furthermore, placing a similar construction on the District of Columbia abortion statute would be consistent with this Court's interpretation of comparable provisions of prior narcotics laws allowing a physician to dispense narcotics to addict-patients "in the course of his professional practice." In *Linder v. United States*, 268 U.S. 5, 14-22, and *Boyd v. United States*, 271 U.S. 104, 106-107, the Court held that a charge of violating the statute was subject to an absolute defense of good faith belief by the physician that the drugs were appropriate for treatment of the addict.

Once the District of Columbia abortion statute is interpreted to give rise to a defense of good faith, the vagueness attacks on the words of the statute can be seen in their proper context. While we show in the next section of this brief that the words "life or health" are not fatally imprecise, it is enough to say at this point that the availability of the good faith

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<sup>22</sup> The Massachusetts statute used the word "unlawfully" to describe the type of situations in which abortion is proscribed. The Court in *Kudish* stated that its cases had developed from this the doctrine that a "physician may lawfully perform an abortion if he acts in good faith and in an honest belief that it is necessary for the preservation of the life or health of the woman" (248 N.E. 2d at 266). The same result was reached under Oregon's quite different law. *State v. Elliott*, 234 Ore. 522, 383 P. 2d 382. The *A.L.I. Model Penal Code*, Proposed Official Draft, Section 230.3 (1962) also provides in effect that a "physician's honest belief in the existence of the justifying circumstances will exculpate." Commentary, Tent. Draft No. 9, p. 156. See also Louisell & Noonan, *Constitutional Balance in The Morality of Abortion*, p. 230 (ed. by Noonan, 1970).

defense gives the doctor considerable—and perhaps, as a practical matter,” complete—insulation from arbitrary findings of a trier of fact. For, once a doctor shows that he made a medical judgment that the mother’s health required an abortion, the government must establish, not merely that the judgment was wrong, but that the health grounds were so frivolous as to negative the doctor’s good faith.

3. The phrase “necessary for the preservation of the mother’s life or health” is not unconstitutionally vague.—The vice of vagueness lies in the failure of a “criminal statute \* \* \* to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.” *United States v. Harriss*, 347 U.S. 612, 617. The Constitution does not impose “impossible standards”, however, as all that is required is that statutory language “conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” *United States v. Petrillo*, 332 U.S. 1, 7–8. Applying these traditional standards, the phrase “necessary for the preservation of the mother’s life or health” of the District of Columbia abortion statute is not so indefinite as to support a holding of void-for-vagueness.

In analyzing that statutory phrase, the legislative

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<sup>22</sup> It is highly unlikely that the government would seek indictments in cases where the circumstances indicate that a bona fide pre-abortion examination was made by the doctor and arguable health grounds for the abortion existed.

history of 22 D.C. Code 201 is of little help.<sup>30</sup> Furthermore, interpretations of state abortion statutes are of limited usefulness; while many state statutes contain the "life" standard, few incorporate the "health" concept.<sup>31</sup> The absence of these two sources of guidance, however, is not fatal.

The district court was concerned by the fact that the statute did not indicate whether the word "health" included mental as well as physical well-being (App. 7). This, we submit, is unwarranted. As the recent

<sup>30</sup> The statute was enacted in substantially its present form in 1901 as Section 809 of the 1901 District of Columbia Code, 31 Stat. 1322. It was later amended in 1953 to increase the punishment but was substantively left unchanged. 67 Stat. 93. Prior to 1901 the existing statute proscribing abortion made an exception only "for the purpose of preserving the life of any woman pregnant, \* \* \* induction of premature labor having been previously recommended by at least one physician in counsel." Abert, *The Compiled Statutes in Force in the District of Columbia*, Ch. XVI, pp. 13-20 (1894). The legislative history of the 1901 Act contains no discussion of Section 809. The House Report (H. Rep. No. 1017, 56th Cong., 1st Sess.) merely discusses the origins of the Code. It was prepared by Judge Cox of the Supreme Court of the District of Columbia and approved by the D.C. Bar Association prior to its introduction in Congress. Judge Cox stated that in writing the Code he made reference to the laws of Maryland, Virginia, New York and Ohio (none of whose abortion statutes, however, included an exception to preserve the "health" of the mother). There was no Senate Report.

<sup>31</sup> For a collection of State abortion statutes as they existed in 1961, see Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 Geo. L.J. 395, 447-520 (App. I) (1961). Among the States which have enacted new abortion laws since 1961 are Colorado (Colo. Rev. Stat. 40-2-23) and North Carolina (Gen. Stat. 14-45.1), both of which adopted laws closely related to that of the District of Columbia in that they extend the conditions under which abortions may be performed to those involving a threat to the mother's "health" as well as her "life."

opinions of the District of Columbia Court of Appeals in *Doe v. General Hospital*, No. 24,011, decided March 20 and May 15, 1970, clearly indicate, the mental health of the mother is being and has been considered as a valid criterion for the performance of abortions within the District of Columbia. The district court's further concern that the medical profession could not ascertain the scope of the word "health" with the requisite definiteness is also unfounded.<sup>32</sup> Whether any surgical procedure is necessary to preserve the health of an individual is a judgment that physicians are called upon to make almost every time surgery is contemplated. Indeed, the majority opinion in *People v. Belous*, 80 Cal. Rptr. 354, 458, P. 2d 194, certiorari denied, 397 U.S. 915, which found the "life" standard of the pre-1967 California abortion statute unconstitutionally vague,<sup>33</sup> noted that the test currently in effect in California—authorizing abortions where there is a "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" (Cal. Health and Safety Code Section 25951(c)(1))—"is a medical one \* \* \* and the assessment does not involve con-

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<sup>32</sup> It should be noted that expert medical judgments pursuant to standards no more certain than the standard here under attack must be made in other contexts. One example would be the medical judgments required under the various formulations of mental responsibility for crime. Cf. *Powell v. Texas*, 392 U.S. 514, 536-537.

<sup>33</sup> For a critical analysis of the *Belous* decision, see Louisell & Noonan, *supra* n. 28, at pp. 237-241.

siderations beyond medical competence." (458 P. 2d at 205).<sup>34</sup>

Finally, there is nothing defective about the phrase "necessary for the preservation of" in the District of Columbia statute. The uncertainty found in the similar California language by the *Belous* court stemmed from its association with the word "life" alone.<sup>35</sup> No such ambiguity is present when the more inclusive term "health" is added.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded with directions to reinstate the indictments against appellee.

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<sup>34</sup> As the *Belous* case was only concerned with the constitutionality of the old California abortion statute, the majority specifically disclaimed passing on the adequacy of the new test adopted in 1967 (458 P. 2d at 206, n. 15).

<sup>35</sup> The *Belous* majority noted that the various dictionary definitions of the word "preserve" used in the California statute ranged "from the concept of maintaining the status quo—that is, the woman's condition of life at the time of the pregnancy—to maintaining the biological or medical definition of 'life'—that is, as opposed to the biological or medical definition of 'death'," 458 P. 2d at 198.